Supreme Court, U.S.
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No. 97-960

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1997

K.R. an infant by her parents and next friends M.R. and K.R.R., and M.R. and K.R.R.,

Petitioners,

v.

Anderson Community School Corporation,

Respondent,

On Petition For Writ of Certiorari to The United States Court of Appeals for the Seventh Circuit

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Petitioner's Reply Memorandum

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Petitioner's Reply Memorandum

The Respondent, Anderson Community School Corporation, in its opposing brief in 97-960, raises several points which Petitioners feel require a reply:

I. Anderson Community School Corporation misconstrues Petitioners' Petition regarding the case of Zobrest v. Catalina Foothills School District, 113 S.Ct. 2462 (U.S. 1993), in particular, Petitioners reference at page 10 of its brief, to Zobrest at 2467:

> "By according parents freedom to select a school of their choice, the statute ensures that a government paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents."

Respondent misconstrues the intent of Petitioner, at pages 7 and 8 of it's Brief in Opposition, by indicating Petitioner believes this case mandates providing an instructional assistant on-site. Zobrest, Petitioner agrees, stands for the proposition that providing a sign language interpreter on site at a parochial school is a neutral service and therefore not a violation of the Establishment Clause. However, Zobrest, at 2467, also supports the proposition that parents have choice, and the decision of the Seventh Circuit Court of Appeals is in conflict with that, and so are the 1997 Amendments.

Respondents refer to proposed regulation 34 C.F.R. 300.454 (a) that states:

> "No private school child with a disability has an individual right to receive some or all of the special education and related services that a child would receive if enrolled in a public school."

Respondent, at pages 8-9 of its Brief in Opposition would have us accept this on its face, yet this language does not appear, nor does the intent of this language appear, in Section 612 (a)(10)(A) of the 1997 Amendments and from which section the proposed regulation proposes to derive its statutory authority. Petitioners have discussed this thoroughly in their Petition for Certiorari at pages 11 through 15, and will not discuss it further here. Petitioner would add that in Fowler v. Unified School Dist. No. 259 128 F.3d 1431(10th Cir. 1997), at 1438, at footnote 5, further bear out the ambiguity of the 1997 Amendments on this question:

> "On the one hand, one could agree there is no point to specifying that the child-find requirements apply to private school children, if there is no intent to provide some level of service to each such child..."

Further in Fowler at 1438, footnote 5:

> "On the other hand, the Act appears to address all private school students, and does not evidently contemplate that some voluntarily placed private school students will receive no services."

Consequently the proposition by Respondents, at page 9 of their Brief in Opposition, that Respondents are wanting to insure a free private education is simply not true.

Respondents, at page 9 and 10 of their Brief in Opposition, further argue that Petitioners are trying to create a right to a free private education, by arguing that the non-supplanting language of the 1997 Amendments §612 (a)(18)(C) is not applicable. Respondent erroneously argues that this section does not require the use of local dollars. Yet, all students qualifying for special education services are to receive local dollars. Respondents, and the 1997 Amendments, want to limit that to only those students in public schools. Yet, this was never the intent under IDEA, nor was it when the State of Indiana agreed to accept the program under I.C.20-1-6-4. Respondents try to further their position on this, at page 11 of their Brief in Opposition by arguing IDEA creates obligations for the public school, while financing only eight (8) percent of the cost. Petitioners believe this question of cost is the real issue in this case. Following the reasoning of Respondents, it seems it is easier for the schools to penalize students by refusing service, rather than refuse participation in a program that they believe is inadequately funded. The school seems to care more about money than it does the handicapped children needing services in it's district. If the Federal funding is below the requisite level needed to carry out an appropriate program for handicapped children, why does the state and Anderson Community Schools continue to participate. It is not mandatory, but it would require having to give up the eight (8) percent funding received from the Federal Government.

Finally, Respondents refer to the proposed regulation 34 C.F.R. 300.455(c), regarding the meaning of "comparable benefits", and that this proposed regulation supports the decision of the Seventh Circuit. (Resp. Brief in Opp. pp 13-14). Yet, Respondents offer no answer for the conflict between this proposed regulation and EDGAR regulation 34 C.F.R. 76.654(a) regarding the meaning of comparable benefits. It is important for the Supreme Court to determine the meaning of comparable benefits in relation to handicapped students in private schools, if litigation of this issue is to be eliminated.

II. Anderson Community School Corporation, in its opposing brief in 97-960, objects to the issue raised by Petitioners contending that Anderson Community School's conduct violates the neutrality principle under the First Amendment, on the grounds it is just now being raised for the first time before this Court. (Brief in Opp. pp. 13-14)

Petitioners would show the Court that this issue was previously raised and is clearly in the record below.

Petitioner's complaint, filed in the District Court on May 6, 1994, contains a Preliminary Statement which states in part:

> "Defendant's action in refusing to provide necessary special education and related services violates 20 U.S.C. Sections 1401 et seq. and the regulations promulgated thereunder and infringes on Plaintiffs' free exercise of religion rights secured by the First Amendment..."(Ct. of Appeals Rec. p. 5)

The Complaint at rhetorical paragraph 14 states:

> "The defendant's refusal to extend to K.R. the important government benefit of the special education and related services which are appropriate for her unless she leaves the private school and attends public school is a burden on the free exercise of your Plaintiffs' sincerely held religious convictions and beliefs which is protected by the free exercise clause of the First Amendment of the Constitution of the United States....."(Ct. of Appeals Rec. p.8)

Petitioners in their Brief in Support of Complaint, at pages 15 through 21, before the District Court discuss the issue of K.R.'s First Amendment rights. (Ct. of Appeals Rec. pp.59-65) In specific, on page 17 of its brief in the District Court, Petitioners state:

> "The Supreme Court clearly states that IDEA provides a benefit to the child, not the school, and that IDEA benefits are to be distributed neutrally without regard to the sectarian-nonsectarian or public-nonpublic nature of the school the child attends." (Ct. of Appeals Rec. p.61)

The District Court acknowledges in its opinion:

> "Plaintiffs also argue that even if the IDEA itself does not require the school corporation to provide an instructional assistant for K.R. at St. Mary's, the school corporation's failure to do so, along with K.R.'s acknowledged need for an

> instructional assistant imposes a substantial burden on their choice to have K.R. attend St. Mary's. Plaintiffs claim that this burden violates their First Amendment right to free exercise of religion..." (Dist. Ct. Op. pp.A 20-A 21)

In reaching its decision, the District Court states:

> "Because plaintiffs are entitled to relief under the IDEA, this Court need not decide whether the First Amendment's Free Exercise Clause and/or the Religious Freedom Restoration Act would independently require the same result." (Dist. Ct. Op. p. 41)

Petitioners also raised the issue in the remand to the Seventh Circuit. Petitioners submit that, based on the above, it is clear that the First Amendment rights of K.R., including the neutrality principle, have been previously raised, and are still a significant issue in this case. Petitioners believe that the objection is not well founded and should be denied.

III. Respondents, at page 14 of their Brief in Opposition, raise the proposed regulation 34 C.F.R. §300.457(a) to indicate that private school children will no longer have due process rights under IDEA. This is not a relevant point with this case, as the regulations are not final. Further, the regulations could not be made retroactive, as the 1997 Amendments to IDEA are not retroactive. The Seventh Circuit had reach this decision in Doe by Doe v. Board of Educ. of Oak Park & River Forest High Sch. Dist. 200, 115 F.3d 1273, 1283 (7th Cir 1997). This also raises a question of whether the 1997 Amendments give statutory authority for this

regulation. In Fowler, at 1438, footnote 6, the Court questions whether the denial of due process procedures is consistent with the IDEA and its Amendments.

Petitioners believe that the objection is not well founded and should be denied.

For the foregoing reasons, the Petitioners respectfully request that their Petition of Writ of Certiorari be granted.

Respectfully submitted,

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